MOHD FAIZOL MOHAMAD

v.

MAGISTRATE, MAGISTRATE'S COURT, KULIM & ORS

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CRIMINAL APPLICATION NO: 44-12-1997]
7 AUGUST 1998

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Order of residence - Section 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 - Detention of drug dependant at rehabilitation centre - Legality - Whether order procedurally improper - Whether unconstitutional - Whether applicant given opportunity to make proper representation - Whether applicant must first apply for writ of certiorari - Federal Constitution, art. 5*

The applicant was held to be a drug dependant and was ordered by the magistrate to reside and undergo treatment at the Serenti Rehabilitation Centre pursuant to s. 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The applicant alleged that the order of residence was tainted with serious breaches of procedure, as the magistrate, in making the order, had failed to supply or explain to him the rehabilitation officer's report or to explain to him his right to make a representation. The applicant then applied for a writ of *habeas corpus* for his release. The facts showed that the notes taken by the magistrate at the proceedings were sketchy, and there was nothing therein that showed that the alleged failures aforesaid did not in fact take place. Before the learned judge, the Federal Counsel raised a preliminary objection, arguing that upon the authority of *The King v. The Commanding Officer of Morn Hill Camp Winchester, ex p Fergusen* and *Ahmad Bashid Abdul Malik & Yang Lain v. Timbalan Menteri Dalam Negeri Malaysia & Yang Lain*, it was wrong of the applicant to have challenged the magistrate's order by way of *habeas corpus*, and that the proper procedure was for him to apply for an order of *certiorari* to quash the said order.

Held:

[1] Section 6 of the Act confers on a person produced before a magistrate (under that section) the right to make a representation. This right must be explained to him by the magistrate. It is also the magistrate's duty to supply such a person with a copy of the rehabilitation officer's report, and to read and explain to him the contents thereof before making an order.

[2] This court could not agree with the submission that the magistrate's order under s. 6 of the Act herein was challengable only by way of *certiorari*. The submission, if accepted, would tantamount to this court taking a step backwards in terms of protecting the liberty of the subjects of this nation. Likewise, the efficacy of the writ of *habeas corpus* would be seriously impaired. In the context of constitutional law, such a proposition would be contrary to the letter and the spirit of art. 5 of the Federal Constitution which clearly confers on the applicant the right to make an application for a writ of *habeas corpus*.

[3] Also, in the context of the constitutional protection, there is nothing exceptional about a purported order of a magistrate pursuant to s. 6 of the Act. If a magistrate has acted beyond his jurisdiction or has committed a serious breach of procedure, such as denying a potential detainee the right to make a full and proper representation, as alleged herein, then the purported order will be of no effect. Such an order is defective and any detention of a person under it will be unlawful, being contrary to art. 5 of the Federal Constitution.

[Preliminary objection overruled; applicant set free upon the Federal Counsel conceding to application for habeas corpus.]

Cases referred to:

Ahmad Bashid Abdul Malek & Yang Lain v. Timbalan Menteri Dalam Negeri Malaysia & Yang Lain [1998] 2 CLJ 457 ***(not foll)***

Teh Guan Teik v. Inspector General of Police & Anor [1998] 3 CLJ 153 ***(refd)***

The King v. The Commanding Officer of Morn Hill Camp Winchester, ex p Fergusen [1917] 1 KB 176 ***(not foll)***

Legislation referred to:

Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)(a)

Other sources referred to:

Administrative Law, HWR Wade & CF Forsyth, 7th edn, p 620

For the applicant - En Vikneswaran
For the respondents - Mohd Abazafree FC

Reported by WA Sharif

JUDGMENT

Hishamudin Yunus J:

This is an application for the writ of *habeas corpus* by the applicant, Mohd Faisol, for his release from detention at the Serenti Rehabilitation Centre. This Centre is a governmental institution, under the administrative jurisdiction of the Ministry of Home Affairs, for the detention and rehabilitation of drug addicts.

At the commencement of the hearing of this application before me on 17 March 1998, the learned Federal Counsel, Ministry of Home Affairs, Encik Abazafree, appearing for the respondents, informed the court that he had a preliminary objection to make.

The objection taken was that the applicant was wrong in procedure in applying for a writ of *habeas corpus* to secure his release from detention. The learned Federal Counsel contended that the proper mode of action was for the applicant to apply for a writ of *certiorari.*

I directed counsel of both sides to submit written submissions on the point raised in the preliminary objection.

Having considered the written submissions and the affidavits, I shall now give my judgment.

First, I shall set out the facts of the case.

The applicant is twenty-four years old. He is a bachelor. The police arrested him on 2 April 1997. He was taken first, to the Police Station at Kop, and, thereafter, to the Police Station at Kulim. On the day of arrest (ie, 2 April), he was produced before the magistrate at Kulim who then ordered that he be remanded for the purpose of undergoing urine tests.

Subsequently, on 8 April 1997, the magistrate at Kulim, issued an order pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (hereinafter shall be referred to as the "Act"). I shall set out below the full provisions of s. 6 of the Act.

> 6. Magistrate's order which may be made on a drug dependant.
>
> (1) Where a person who has undergone the tests referred to in s. 3 or 4, and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear, before a magistrate and if the magistrate, after giving such person an opportunity to make representations –

(a) is satisfied that such person requires to undergo treatment and rehabilitation at a Rehabilitation Centre, order such person to reside at such centre for a period of two years to undergo treatment and rehabilitation and thereafter to undergo after-care in accordance with the provisions of this Act relating thereto; or

(b) is satisfied that such person's treatment and rehabilitation may be carried out otherwise that at a Rehabilitation Centre, he may order such person to be placed under the supervision of a Rehabilitation Officer for a period of not less than two and not more than three years, and to execute a bond with or without sureties, as the magistrate may determine, to remain under such supervision for such period:

Provided that where such person fails to execute such bond an order under para. (a) shall be made against him by the magistrate.

(2) An order of supervision under para. (b) of sub-s. (1) shall contain the condition requiring such person to abstain from the dangerous drugs and may contain conditions as to residence, employment, associations, abstention from intoxicating liquor, or attendance at a Day Centre.

(3) The magistrate shall, before making an order either under para. (a) or (b) of sub-s. (1), consider a report by a Rehabilitation Officer on such person, a copy of which shall be supplied to such person, and which shall be read out and explained to him.

(4) In making an order under sub-s. (1), the magistrate shall have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person against whom the order is proposed to be made.

(5) A certificate under sub-s. (1) purporting to be signed by a government medical officer or a registered medical practitioner shall be receivable by a magistrate without proof of the signature thereon, and the magistrate shall accept it as proof of its contents, unless the contrary is proved.

It will be observed that the above provision confers on a person produced before a magistrate (under the said section) the right to make a representation. It is implicit that this right must be explained to him by the magistrate. To facilitate the making of the representation, the section imposes a duty on the magistrate to supply (or to cause to be supplied) such person a copy of a report by a Rehabilitation Officer. In addition, the provision imposes on the magistrate the duty to read and explain (or to cause to be read or explained) to him the contents of the report before making the order.

The notes of the proceeding before the magistrate are rather brief and sketchy. They read as follows:

8/4/97

Pegawai Pemulihan – Encik Sarif
Subjek – hadir
Laporan Perubatan – positif morfin – diakui – P1
Laporan Sah Penagih – diakui – P2
Laporan Pegawai Pemulihan – difahamkan – P3

Subjek:
Pohon jamin. Kini telah insaf

Pegawai Pemulihan – Syor ke pusat

Mahkamah:
Subjek diperintah ke pusat pemulihan selama 2 tahun.

It is, *inter alia*, alleged in the affidavit in support of the application that the applicant was denied the right to make a full and proper representation by reason of the failure of the magistrate –

(a) to supply him with a copy of the Rehabilitation Officer's report;

(b) to read and to explain to him the report; and

(c) to explain to him of his right to make a representation against the proposed detention.

Having set out the background, I shall now say a few words on *habeas corpus*. The writ of *habeas corpus* has its origins in English law. It is the most famous writ in English law. It is called the great writ of liberty. The origin and history of the writ are lost in antiquity. But it takes its name from the two mandatory words *habeas* and *corpus* which it contained at the time when it, in common with all forms of legal process, was framed in Latin. There is, however, ample evidence that it was in use before the days of Magna Charta. There are traces of its existence in the *Year Book 48,* Ed. III. 22, and it appears to have been familiar and well understood by the judges in the reign of Henry VI. After a long struggle, it was firmly guaranteed by the famous Habeas Corpus Act of 27 May 1679. The writ of *Habeas Corpus ad Subjiciendum* (that you have the body to submit or answer), which is commonly known as the writ of *habeas corpus,* is a prerogative process for the securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or private custody.

I shall now revert to the arguments. It is argued by the learned Federal Counsel that an order under s. 6 of the Act, so long as it is proper in form and bears the signature and seal of the magistrate, cannot legally be challenged by way of *habeas corpus.* It could only be challenged by way of *certiorari.* He relied on two authorities, namely –

(a) *The King v. The Commanding Officer of Morn Hill Camp, Winchester Ex parte Fergusen* [1917] 1 KB 176; and

(b) *Ahmad Bashid Abdul Malek & Yang Lain v. Timbalan Menteri Dalam Negeri Malaysia & Yang Lain* [1998] 2 CLJ 457.

With respect, I must strongly disagree. If I were to accept this submission, it would tantamount to this court taking a step backwards in terms of protecting the liberty of the subjects of this nation. The efficacy of the writ of *habeas corpus* would be seriously impaired. It would be a radical departure from the existing principles on *habeas corpus.*

In the context of constitutional law, such a proposition, if accepted, would clearly be contrary to the letter and the spirit of art. 5 of the Federal Constitution, which guarantees –

5. Liberty of the person.

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

The applicant now before me is complaining that the deprivation of his personal liberty has not been in accordance with the law and that he is being unlawfully detained. The reasons are explained in the affidavit. The above Article clearly confers on him the right to make an application for a writ of *habeas corpus*. In other words, the gravamen, *prima facie,* satisfies the provisions. In the circumstances, with the greatest respect, it simply does not make sense to me for the Federal Counsel to argue or even to suggest that anyone in the shoes of the applicant would be proceeding on a wrong footing in applying for a writ of *habeas corpus*. On my part, in the context of the constitutional protection, I do not see anything exceptional about a purported order of a magistrate pursuant to s. 6 of this Act. If a magistrate acted beyond his jurisdiction or committed a serious breach of procedure, such as denying

the potential detainee the right to make a full and proper representation, as has been alleged in the present case, then the purported order would be of no effect: it is a defective order; and any detention of a person under that order would be unlawful; it would be contrary to article 5.

In fact, there is nothing novel in the submission of the learned Federal Counsel. For, at one time in England the courts, in certain cases, insisted on the prisoner, applying for a writ of *habeas corpus*, to apply simultaneously for *certiorari*. In *Administrative Law* by H.W.R. Wade and C.F. Forsyth (7th Edn.) it is stated (at p. 620):

> Before it was established that all error of law is *ultra vires* the House of Lords in *Armah* case indicated that the scope of review on *habeas corpus* was as wide as that on *certiorari;* and that, therefore, it extended to mere error on the face of the record, even though made (as was then supposed) within jurisdiction. At one time the prisoner would have to obtain *certiorari* to quash the detention order at the same time as *habeas corpus* to secure his release, in order to succeed on this ground. **But to insist upon a separate *certiorari* was pointless formalism, since the *habeas corpus* brought the whole question of the validity of the detention before the court.** It therefore became the practice to receive the deposition of evidence as if there had been a *certiorari* and to treat them as part of the record, in the same way as used to be done in reviewing magistrates' decisions before 1848. If error of law then appeared, *habeas corpus* would be granted and the detention order would in effect be quashed, just as it might have been quashed on *certiorari.* [Bold is mine.]

With respect, the decision in *Ex parte Fergusen*, cited by the learned Federal Counsel, is irrelevant for that case can be distinguished on the facts. In that case, the complaint was not that there had been a serious breach of procedure on the part of the magistrate who had made the order. There the complaint was merely that the magistrate making the order, on the merits of the case before him, came to the wrong conclusion.

However, in the present case, the decision of the learned magistrate is not being challenged on the merits. What the applicant is complaining is that there had been a serious breach of procedure. In fact, the case cited *(Ex parte fergusen)* is in favour of the applicant in the present case. For, in that case, there is a statement on the law to the following effect (at p. 179):

> The law on this matter is well stated by Lord Denman CJ in *Reg. v. Bolton* 1 QB 66, 72:

> The case to be supposed is one like the present, in which the Legislature has entrusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. *All that we can do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law.* Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it.
>
> It is true that *Reg. v. Bolton* was a case of a *certiorari*, but the same principles apply in the case of a *habeas corpus.* [Bold is mine.]

The above passage contains two principles. First, the High Court cannot issue a writ of *habeas corpus* where the complaint is merely that on the merits the magistrate, making the order of detention, came to a wrong conclusion. Second, the High Court may issue a writ of *habeas corpus* if it is shown that the magistrate acted outside his jurisdiction or that the proceeding was irregular or not in accordance with the law.

Now, the same argument that was submitted before me in the present preliminary objection was advanced before Azhar Ma'ah JC (as he then was) in *Ahmad Bashid.* The argument was, however, accepted by the learned Judicial Commissioner. With respect, I wish to differ for the reasons which I have given above. I just would like to add that in *Ahmad Bashid,* one of the grounds given by the learned Judicial Commissioner for his decision was the decision of the Court of Appeal in *Inspector General of Police & Anor v. Teh Guan Teik* (Civil Appeal No. N-01-7 of 1994); but this decision has been overruled by the Federal Court in *Teh Guan Teik v. Inspector General of Police & Anor* [1998] 3 MLJ 137.

The preliminary objection is therefore overruled. I shall now proceed to hear the application proper.

[Upon the preliminary objection being overruled, the learned Federal Counsel, conceded to the application for a writ of *habeas corpus* and the court accordingly orders that the applicant be set free.]

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